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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY MCNEAL,

Defendant and Appellant.

B206103

(Los Angeles County  
Super. Ct. No. BA289326)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Samuel Mayerson, Judge. Affirmed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Kenny McNeal was convicted, following a jury trial, of one count of selling or offering to sell cocaine base in violation of Health and Safety Code section 11352, subdivision (a). Appellant admitted that he suffered a prior felony conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), a prior felony conviction for which he served a prison term within the meaning of Penal Code section 667.5, subdivision (b) and a prior juvenile adjudication within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law). The trial court sentenced appellant to the upper term of five years for the current conviction plus a three-year enhancement term pursuant to Health and Safety Code section 11370.2. The court struck appellant's two other prior convictions.

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to advise him of all the constitutional rights he waived when admitting his prior convictions. Appellant also requests that this court review the transcripts of the in camera hearing on his *Pitchess* motion. We affirm the judgment of conviction.

### Facts

On August 27, 2005, Los Angeles Police officers were working undercover in the vicinity of Main and 7th Streets in Los Angeles. They observed appellant sell what appeared to be cocaine to different men in a matter of minutes. The officers arrested appellant and his second customer. The customer had a plastic bindle containing a substance later determined to be cocaine base. Appellant had fifty-five dollars on his person.

### Discussion

#### 1. Voluntariness of admissions

Appellant contends that the trial court erred in failing to advise him of the constitutional rights he was waiving when he admitted his priors, and also the penal consequences of those admissions.

"Ideally, a defendant admits a prior conviction only after receiving, and expressly waiving, standard advisements of the rights to a trial, to remain silent, and to confront adverse witnesses." (*People v. Mosby* (2004) 33 Cal.4th 353, 365.) When a defendant does not expressly waive these rights, a reviewing court examines the record to see whether it shows that the admission was voluntary and intelligent under the totality of the circumstances. (*Id.* at p. 360.) The test is "whether the plea represents a voluntary and intelligent course among the alternative courses of action open to the defendant." (*Id.* at p. 361, internal quotation marks and citation removed.)

The Court in *Mosby* held that when, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, that admission can be voluntary and intelligent under the following circumstances: the defendant exercised his right to remain silent at trial, and through counsel cross-examined witnesses. (*Id.* at pp. 356, 364.) A defendant's prior experience with the criminal justice system may also be relevant, particularly if the defendant has pled guilty previously. (*Id.* at p. 365.)

Here, near the end of the trial in this matter, the court discussed bifurcation of the trial of the prior conviction allegations. The court explained to appellant that in a court trial of the issue, the district attorney would still have to present evidence. Appellant agreed to a court trial of the priors. The district attorney informed appellant: "Mr. McNeal, you are entitled to a jury trial as to whether or not the priors alleged in the information are yours. You are entitled to a jury trial. [¶] Do you waive and give up that right so that the judge, Judge Mayerson, may decide whether or not you have suffered those prior convictions?" Appellant replied: "I do."

The morning after the verdict was read, the court asked appellant's counsel: "We have scheduled a court trial on the issue of the priors. [¶] [Appellant's counsel], what has your client decided? You must state now on the record, please." Appellant's counsel replied: "Yes, Your Honor. I had a discussion with [appellant], and he is willing to waive his right to a hearing and admit the prior felony convictions." The district attorney then took appellant's admissions.

We conclude that appellant voluntarily and intelligently admitted his prior convictions under the totality of the circumstances. Appellant was formally advised of and expressly waived his right to a jury trial on the priors. During that advisement and waiver, appellant asserted his right to a court trial. Clearly, he was aware of this right. The court made it clear that a court trial, like a jury trial, would require the People to present evidence to prove their allegations. Appellant did not expressly waive his right to a court trial, but he stood silent while his attorney stated that appellant waived that right. Immediately thereafter, appellant admitted the convictions. It is reasonable to infer from this set of circumstances that appellant voluntarily waived his right to a court trial.

Appellant's admissions took place immediately after a jury trial in which he exercised his right to remain silent.<sup>1</sup> During that trial, his counsel exercised his right to confront witnesses. Thus, we conclude that appellant was aware that he would have had the right to silence and to confrontation in a trial on the priors, and waived those rights when he waived his right to trial.

Appellant notes that the defendant in *Mosby* had previously pled guilty and had been advised of his constitutional rights at that time. (*People v. Mosby, supra*, 33 Cal.4th at p. 365.) He points out that there is nothing in the record to suggest that he had ever pled guilty or admitted a prior conviction allegation. Appellant has correctly stated the facts in *Mosby*, but we do not understand that case as requiring a prior guilty plea or conviction admission. The Court simply recognized that "'a defendant's prior experience with the criminal justice system'" is relevant to the question of whether he knowingly waived constitutional rights. (*Ibid.*) A prior guilty plea or admission is highly relevant. Assuming that appellant's two prior convictions were the result of jury trials rather than

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<sup>1</sup> We note that the trial court instructed the jury, in appellant's presence that "[a] defendant had an absolute constitutional right not to testify. He may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider for any reason at all the fact that the defendant did not testify."

guilty pleas, we would view two prior jury trials as providing a defendant with solid knowledge of his constitutional rights.

Appellant relies on *People v. Campbell* (1999) 76 Cal.App.4th 305 and *People v. Johnson* (1993) 15 Cal.App.4th 169 to show error. That reliance is misplaced. *Campbell* is a true silent-record case; the defendant was not advised of any of his constitutional rights, including his right to a jury trial, before admitting his prior convictions. (*People v. Campbell, supra*, 76 Cal.App.4th at pp. 309-310; *People v. Mosby, supra*, 33 Cal.4th at p. 362.) *Johnson* is "so nearly silent as to be indistinguishable from" a true silent record case. (*People v. Mosby, supra*, 33 Cal.4th at p. 362.) As we discuss, *supra*, this case is not a silent, or nearly silent record case. Appellant was advised of and expressly waived his right to a jury trial. Appellant requested a court trial, then waived such a trial through his counsel.

Appellant also contends that the trial court failed to advise him of the penal consequences of his plea. Appellant was clearly made aware of those consequences at the sentencing hearing, and did not object. He has thus forfeited this claim. (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

## 2. *Pitchess* motion

Appellant requests that this Court conduct an independent review of the in camera proceedings done by the trial court in response to appellant's *Pitchess* motion for discovery of peace officer personnel records.

When requested to do so by an appellant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the transcript of the in camera proceedings and see no error in the trial court's rulings concerning disclosure.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.